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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Diane Schafer Goodstein, Circuit Court Judge
Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY NICHOLAS ARGOE,

APPELLANT

APPELLATE CASE NO. 2023-000223

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by denying appellant's motion to represent himself pursuant to Faretta v. California, 422 U.S. 806 (1975) since the court's reasoning that self-representation was not a "wise choice" and not likely to lead to a successful result were not legitimate reasons to force appellant to be represented by counsel where appellant knowingly and voluntarily wanted to waive his right to counsel and to represent himself?

STATEMENT OF THE CASE

Appellant was indicted in the Dorchester County grand jury for the offense of murder. R. *. Prior to trial, pre-trial hearings were held, *inter alia*, on appellant's motion to relieve his trial counsel and to proceed *pro se*, on July 25, 2022, September 16, 2022, January 19, 2023, and February 3, 2023.

Appellant's case was called to trial on February 6, 2023, before the Honorable Diane Goodstein, and a jury. Ashley D. Chisholm represented appellant. David Osborne and Mark Hinds were the assistant solicitors.

On February 9, 2023, the jury found appellant guilty. Tr. 663, ll. 12-15. Judge Goodstein sentenced appellant to life imprisonment. Tr. 669, ll. 6-11

This appeal follows.

STANDARD OF REVIEW

“Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo.” State v. Samuel, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018).

Appellate courts review “a circuit judge’s findings of historical fact for clear error,” but “review the denial of the right of self-representation based upon those findings of fact de novo.” Id. When reviewing a trial judge’s refusal to permit an individual to proceed *pro se*, the appellate court “must consider the defendant’s testimony, history, and the circumstances of his decision, as presented to the circuit judge at the time the defendant made his request.” Id.

ARGUMENT

The court erred by denying appellant's motion to represent himself pursuant to *Faretta v. California*, 422 U.S. 806 (1975) since the court's reasoning that self-representation was not a "wise choice" and not likely to lead to a successful result were not legitimate reasons to force appellant to be represented by counsel where appellant knowingly and voluntarily wanted to waive his right to counsel and to represent himself.

Relevant Facts

On July 25, 2022, Judge Goodstein heard appellant's motion to relieve his trial attorney, Ashley Chisholm. Assistant solicitor Rivers stated that his colleague, assistant solicitor David Osborne, opposed Chisholm being relieved as appellant's attorney. July 25 Tr. 1; Tr. 3, ll. 9-18.

Defense counsel Chisholm responded "Judge, I was curious, if they object to the defendant's motion, does that mean they join in the motion?" The judge responded "I think that's a matter between you and your client. I think what he is trying to express - - Mr. Osborne - - is that he wants the matter to go forward." July 25 Tr. 4, ll. 6-11. Defense counsel Chisholm responded that he understood but that he "just never heard [of] it. [the state's position on who should be allowed to represent a defendant]." July 25 Tr. 4, l. 12.

Appellant told the judge that he did not think defense counsel had spent a sufficient amount of time with him preparing for trial. He was not being represented well, and he had met with defense counsel less than eight times. July 25 Tr. 5, ll. 3-25. Appellant also complained that he had requested certain information including "bank records, text messages, things of that nature" and defense counsel had not produced these items. July 25 Tr. 6, ll. 1-12. In addition, appellant also had asked for body camera footage of the apartment where the crime was committed. July 25 Tr. 7, ll. 2-6.

Defense counsel Chisholm responded that he did not subpoena bank records because he did not think that they were relevant. He also said that because of “COVID restrictions” he had been unable to get access to appellant’s apartment which was the purported crime scene. July 25 Tr. 7, l. 19 – Tr. 8, l. 20.

The judge then told appellant that he was entitled to appointed counsel because he was indigent: “You’re in the jail. You’re not working. So the determination that you are someone who is indigent is probably pretty correct, but you are not entitled to the appointment of any particular attorney. You are entitled, of course, to the appointment of competent counsel.” July 25 Tr. 8, l. 21 – Tr. 9, l. 3.

The judge noted that appellant said he had met with defense counsel eight times while defense counsel thought that they had met about ten times. The judge stated that was not much a difference. The judge ruled:

“I would not be inclined to relieve him from representing you. I know him to be very competent. He has an investigator who’s working on your case with him. He’s met with you many times. He will meet with you many more times. He is certainly proceeding to get the bodycam footage, has received the text messages, which are available.

And there’s nothing that I’m told, at this point, that I have concerns about. And I’m happy to hear any other concerns that you have at this point, but from what I’ve heard up to this point I have no concerns about him continuing to represent you.”

July 25 Tr. 10, ll. 4-13

Appellant then thanked the judge for her time, and the hearing concluded. July 25 Tr. 10, ll. 14-15.

Motion for self-representation

On September 16, 2022, another pre-trial hearing was held before the Honorable Maite Murphy. David Osborne was the assistant solicitor and Ashley Chisholm represented appellant. Sept. 16 Tr. 1.

Defense counsel Chisholm told the judge that appellant was moving to represent himself and to relieve him as counsel. Chisholm said he knew that they would have to “probably be basically be going through the Faretta¹ issues, but there is always a concern that it goes into other areas, that you know, obviously, that I would like to confidential.” Sept 16. Tr. 4, ll. 2-11.

After the judge cleared the courtroom, Chisholm told Judge Murphy that Judge Goodstein had denied appellant’s motion to relieve him as counsel at the hearing on July 25, 2022. “Subsequent to that meeting, I did meet with Mr. Argoe, and he basically told me that is what he would like to do. So, I kind of explained broadly Faretta and things of that nature, and that’s why we’re here today.”² Sept 16 Tr. 5, ll.5-12.

Appellant was placed under oath, and he told the judge that he wished to represent himself. Sept 16 Tr. 5, ll. 22-24. Appellant said: “I just don’t think he is doing right by me. So I’d rather represent myself.” Sept 16 Tr. 6, ll. 1-2.

In response to the judge’s question, appellant said he had “some college” education, and that he was a welder by trade. He had studied law “off the internet.” Appellant said that he was familiar with the rules of evidence. Sept 16 Tr. 6, ll. 3-13.

¹ Faretta v. California, 422 U.S. 806 (1975).

² Assistant solicitor Osborne noted that the state had extended a plea offer to appellant, and that they would keep it open until this case was called to trial on December 12, 2022. Sept 16 Tr. 4, ll. 15-19. Chisholm said appellant was charged with murder and that he believed that the plea offers were in the range of fifteen to thirty years, “off memory.” Sept 16 Tr. 5, ll. 13-17.

The following occurred between the judge and appellant:

“THE COURT: And what’s, say, a 403 objection?

THE DEFENDANT: I’ve got it all in my cell over there.

THE COURT: All right, sir, and can you tell me what a hearsay is?

THE DEFENDANT: It’s irrelevant.

THE COURT: All right, sir. You understand that you’re looking at a murder charge where you’re looking at a potential life sentence? Do you understand that?

THE DEFENDANT: I do.

THE COURT: And you understand that if you are to represent yourself that you would be held to the exact same standards as if you were an attorney? You can’t tell me right now what hearsay is or what a 403 objection is, and those are very basic tenets of the law and the rules of evidence.

I would be extremely concerned for your success as far as representing yourself in going forward with a murder case. Mr. Chisholm is an excellent attorney. He’s tried many cases.”

Sept 16 Tr. 6, l. 16 – Tr. 7, l. 7

Appellant noted that defense counsel had withheld evidence or discovery from him in this case, or the prosecution had withheld such evidence. Sept 16 Tr. 7, ll. 8-12. The judge responded that appellant was an officer of the court and that she had seen him on many occasions zealously advocating for his clients. Defense counsel Chisholm told the judge that he was sufficiently prepared for trial. Sept 16 Tr. 7, ll. 13-19.

The judge then told appellant that if he wanted to hire his own attorney, he could do so, but that researching the law on the internet was not at all comparable to having a law degree and

practicing law. “As far as representing yourself, I don’t think that would be a wise choice for you.” Sept 16 Tr. 9, ll. 13-20.

The judge then asked appellant if he had the money to hire a private lawyer who could be ready for trial in December. Sept 16 Tr. 9, ll. 16-22. The judge also stated that if appellant was able to hire an attorney, that attorney should contact the court, but that retained attorney needed to be ready to go to trial on December 12, 2022. “Otherwise, your motion to relieve Mr. Chisholm is denied. I don’t - - I believe you need representation in this matter. And looking out for your interests as far as properly preparing and being able to defend yourself, I do believe that you need representation in this matter. If you can hire somebody, you’re certainly free and able to do so.” Sept 16 Tr. 10, ll. 11-18.

Attempted motion to reconsider

On January 19, 2023, another hearing was held before the Honorable Diane Goodstein. David Osborne was the solicitor. Ashley Chisholm represented appellant. Jan 19 Tr. 1. Chisholm told the judge that this hearing was on a motion by appellant to represent himself. Jan 19 Tr. 3, ll. 1-12. Appellant told the judge that he wished to represent himself. Jan 19 Tr. 3, ll. 3-15.

Defense counsel Chisholm then gave the judge the procedure posture of the case. He noted that appellant had moved to relieve him as counsel. A hearing was held on July 25, 2022, where that motion was denied by her. Jan 19 Tr. 5, ll. 18-24.

A hearing was next held before Judge Murphy on appellant’s motion to represent himself. Jan 19 Tr. 5, l. 18 – Tr. 6, l. 4. Defense counsel said that Judge Murphy asked appellant what Rule 403, SCRE, governed and appellant was not able to answer the question. Jan 19 Tr. 6, l. 6 – Tr. 7, l. 4.

Chisholm told Judge Goodstein that appellant still wanted to represent himself, and appellant thought that he was competent to represent himself. Appellant wished to have his motion to represent himself reheard “in full and I don’t know if I’m allowed to do this. I explained to Mr. Argoe that this is typically a hearing with, you know, a judge and a defendant to go through. It’s more of a conversation between those two parties as opposed to mine, but he did express some irritation, I guess, that I didn’t say my thoughts at the previous hearing as far as, you know, if I had concerns about his competency and things like that so I told, if Your Honor would allow me I could briefly tell you or if it’s not a part of this hearing I told him that you would tell him that as well.” Jan 19 Tr. 6, l. 6 – Tr. 7, l. 4.

Judge Goodstein then asked how Judge Murphy had ruled on the motion for appellant to represent himself. Chisholm answered that Judge Murphy had denied appellant’s motion to represent himself: “I guess it’s [Judge Murphy’s ruling] a finding that he isn’t competent to represent himself.” Chisholm said appellant was unable to define what hearsay was and what Rule 403 was and that concerned Judge Murphy. “He [appellant] told me he said you could probably ask lawyers and they might not be able to answer that, so. That’s basically the gist.” Jan 19 Tr. 7, ll. 5-14.

Judge Goodstein asked if there was a motion to reconsider raised from the denial of the self-representation motion and counsel Chisholm said that there was not. Jan 19 Tr. 7, ll. 15-17. Judge Goodstein then asked why Judge Murphy’s ruling under Faretta was not the law of the case. Jan 19 Tr. 7. 18-20.

Defense counsel Chisholm responded that he understood the law of the case question or problem but “I think to probably preserve it I would have had to renew this motion prior to trial at some point, which is why I was bringing it up to Your Honor because you are scheduled to

hear the case February 6.” Chisholm offered that appellant wanted to renew his motion to represent himself. Jan 19 Tr. 7, l. 21 – Tr. 8, l. 6.

The judge observed that appellant had moved to represent himself under the Faretta standard, and that motion was denied. The judge then took a break to consider the applicable law. Jan 19 Tr. 8, ll. 13-18. Upon her return, the judge said that Rule 4(b), of the South Carolina Rules of Criminal Procedure controlled. The judge ruled that she could not change the ruling of Judge Murphy which denied appellant’s motion to represent himself. Jan 19 Tr. 8, l. 19 – Tr. 9, l. 20. The judge said that any motion to reconsider would have to be heard by Judge Murphy. Jan 19 Tr. 9, ll. 6-9.

Defense counsel moves to be relieved

A couple of weeks later, on February 3, 2023, another pre-trial hearing was heard before the Honorable Diane Goodstein. Ashley Chisholm and James Adams represented appellant. David Osborne was the assistant solicitor. Feb 3 Tr. 1.

This time, defense counsel Chisholm moved to be relieved as appellant’s attorney. He told the judge that this was the first time in fifteen years he moved to be relieved but that the attorney-client relationship with appellant “has degraded into pretty much open hostility at this point.” Feb 3 Tr. 7, l. 12 – Tr. 8, l. 6.

Chisholm recounted that appellant had previously moved to relieve him, and that motion was denied. Appellant then moved before Judge Murphy to represent himself and Judge Murphy denied that motion for self-representation. Chisholm said he did not take a position one way or another on appellant’s motion to represent himself. Chisholm added: “I would say at this point our circumstances have changed. I guess, I don’t know if I could, but if I could join him in that

motion or if it's just a motion on my own to be relieved. Because what has happened is again, it has devolved into outright hostility..." Feb 3 Tr. 8, l. 7 – Tr. 9, l. 14.

Chisholm said that appellant wanted him to be relieved as counsel and appellant wanted to represent himself. Chisholm added that "now it has gotten to the point where I feel like I am being actually threatened." Feb 3 Tr. 9, ll. 3-16.

Appellant was then placed under oath. The judge told appellant that Chisholm was a very seasoned defense attorney. Feb 3 Tr. 9, l. 21 – Tr. 10, l. 17. Appellant told the judge that he could not communicate with Chisholm any longer and he admitted calling Chisholm "a clown" at one point because he was upset with Chisholm. Appellant said that he understood that Chisholm was a very intelligent person, but they simply could not get along. Feb 3 Tr. 10, l. 14 – Tr. 12, l. 18.

The judge ruled that Chisholm and James Adams would represent appellant at trial, and that co-counsel Adams could serve as a buffer between appellant and Chisholm. Plain clothed police officers would be in the courtroom if any trouble occurred. Feb 3 Tr. 12, l. 24 – Tr. 18, l. 2.

Appellant's case was called to trial on Monday, February 6, 2023 before Judge Goodstein. After some legal arguments on the admissibility of evidence, an in-camera hearing was heard on appellant's motion to relieve Chisholm. The judge said: "I have already heard this. I have heard your concerns a number of times. This is - - jury's been selected. We're about to begin the trial. But I will hear you briefly, sir." Tr. 105, ll. 10-15.

Appellant said that he had been threatened by counsel Chisholm and he wanted Chisholm to move to be relieved the week before. The judge said that she had seen appellant on Friday and

asked him: “Why didn’t you say something about it on Friday?” Appellant said that he did not have his paperwork with him. The judge denied the motion. Tr. 107, ll. 20-23.

Discussion

The court erred by denying appellant his right to represent himself because the court did not think it was “a wise choice,” or because the judge did not think appellant could “successfully represent himself. Sept 16 Tr. 9, l. 13 - 10, l. 20. Respectfully, self-representation would rarely seem to a wise choice but an accused may waive his right to counsel and proceed *pro se*. Faretta v. California, 422 U.S. 806 (1975).

This right to self-representation must be preserved even where the court, as here, believes that the defendant would benefit and be better off being represented by counsel. State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999); State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997); State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1988).

In State v. Stames, 388 S.C. 590, 698 S.E.2d 604 (2010), our Supreme Court noted that in addition to the United States Supreme Court interpreting the United States Constitution as providing a right to self-representation pursuant to Faretta v. California, the South Carolina Constitution also provided that every criminal defendant has the right to represent himself. See, S.C. Const. art. I, § 14.

The Sixth Amendment, it has been widely observed, when naturally read, implies a right of self-representation and provides the right to counsel for a defendant’s benefit if he chooses to exercise that right. The right to represent yourself is a recognition of the dignity of the individual. See, Faretta v. California, 422 U.S. 806, 821 (1975). You cannot force counsel upon a defendant if he knowingly and intelligently waives his right to counsel. State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014): “Faretta requires that a defendant ‘be made aware of the dangers and

disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open.’ 422 U.S. at 835.” Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575 576 (1990).

“While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding. Fitzpatrick v. Wainwright, 800 F.2d 2d 1057 (11th Cir.1986). If the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied. *Id* at 1065.” Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575 576 (1990).

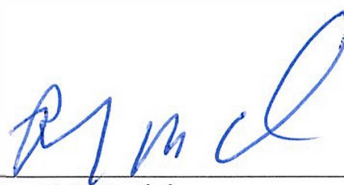
“So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta. State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010).” State v. Barnes, 407 S.C. 27, 35 753 S.E.2d 545, 550 (2014). In this case, appellant timely moved prior to trial to represent himself. Judge Murphy denied that motion for self-representation. The trial judge, Judge Goodstein, at a later pre-trial hearing refused to reconsider Judge Murphy’s denial of appellant’s motion to represent himself.

As seen, appellant told Judge Murphy that he had some college education, and that he had studied law on the internet. Appellant did not know the subject matter of Rule 403, SCRE, and seemed to conflate the Rule 401, SCRE, on relevance with hearsay. Regardless, it was apparent appellant wanted to represent himself and he did not want Counsel Chisolm forced upon him. Appellant was told he could retain other counsel but that representing himself was not an option. The court ruled pre-trial that appellant’s only choices were appointed counsel or retained counsel, and that ruling violated appellant’s Sixth Amendment rights. Faretta v. California, State v. Barnes, supra. Appellant did everything in his power to secure his right to

represent himself. Consequently, he should be granted a new trial. Faretta v. California, State v. Barnes, supra.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Dorchester County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of February, 2024.